

***United States Court of Appeals
for the Second Circuit***



APPENDIX

74-2264

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To be argued by
PHYLIS SKLOOT BAMBERGER

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

DENNIS DRUMMOND,

Appellant.

Docket No. 74-2264

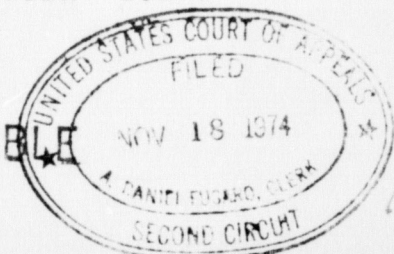
APPENDIX

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
FEDERAL DEFENDER SERVICES UNIT
509 United States Court House
Foley Square
New York, New York 10007
(212) 732-2971

PHYLIS SKLOOT BAMBERGER,
Of Counsel

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72CR 650-TRAVIA, PLATT, JYCHINOTEN

TITLE OF CASE

ATTORNEYS

THE UNITED STATES

U.S.

WALTER DAYS,

* DONALD DAYS, and

α DENNIS DRUMMOND.

xxxx deft DRUMMOND:

LEGAL AID

for WALTER DAYS

Anthony F. Correrri Esq.
50 Mineola Blvd - Mineola NY
516-746-2727

For Defendant: DONALD DAYS:

Ira S. Cooper

26 Court St., Bklyn, NY

855-9252

session & distribution of narcotics.

[illegible]

DATE	PROCEEDINGS
1-72	Before WEINSTEIN, J. - Indictment filed.
72	By Weinstein J - ix Order filed setting case for Pre Trial on June 15, 1972
5-72	Notice of Appearance filed (DAYS) DONALD Donald
5-72	Before WEINSTEIN J - Case called - Defts DRUMMOND & HAYS present with counsels - Both defts arraigned and each enter a plea of not guilty - Simon Chrein of Legal Aid appointed as counsel for deft DRUMMOND. Order to be submitted. Bench Warrant ordered for deft WALTER DAYS - case adjd to June 27, 1972 at 10:00 for pre-trial conference.
-72	By WEINSTEIN J - Order appointing counsel filed (DRUMMOND)
-72	Before WEINSTEIN J - Case called - defts DONALD DAYS & DRUMMOND present with counsel - deft WALTER DAYS reported a fugitive.

72CR 650

DATE	PROCEEDINGS
	Pre Trial Conference held and concluded - further pre trial conference set for July 10, 1972. Govts motion to increase bail as to deft DRUMMONG argued and granted - bail set at \$5,000 personal surety bond with \$500 cash - Bond to be signed by wife and deft - case as to deft DONALD DAYS set for July 31, 1972 at 9:45 am at Westbury for plea. Motion papers to be served by July 7, 1972.
6-30-72	File 72 M 1351 inserted into criminal file.
6-30-72	Letter from Legal Aid Society dated June 30, 1972, received from Chambers of Judge Weinstein filed (re deft DRUMMOND) (Pre Trial conference scheduled on Sept. 7, 1972 from July 10, 1972)
7-7-72	File 72 M 351 inserted into criminal file.
7-10-72	Before WEINSTEIN, J. - Case called. Pre-trial conference adjourned to Sept. 7, 1972 at 10:30 A.M.
7-31-72	Before WEINSTEIN, J. - Case called. Deft DONALD DAYS & counsel present. Deft arraigned and waives prosecution by indictment and pleads guilty to the superseding information 72CR-918. Bail continued.
8-9-72	Letter dated 8-6-72 from deft DAYS filed.(with reply to deft dated 8-9-72 filed)
8-10-72	Government's notice of readiness for trial filed.
8-10-72	Copy of letter from Judge Weinstein to deft Days dated Aug. 10, 1972 filed (re appt of counsel, etc.)
8-11-72	Petition for writ of habeas corpus ad prosequendum filed.
8-11-72	By BARTELS, J. - Writ issued ret 8-16-72 re WALTER DAYS.
8-16-72	Before WEINSTEIN, J. - Case called. Deft WALTER DAYS & counsel present. Deft arraigned & enters a plea of not guilty. Bail set at \$5,000.00 surety bond. Pretrial set for 9-7-72 at 10:30 A.M.
8-16-72	By WEINSTEIN, J. - Order appointing counsel filed(WALTER DAYS).
8-21-72	Writ returned & filed/executed.
9-7-72	Before WEINSTEIN J - Case called - Deft DRUMMOND present with counsel deft DAYS, WALTER & counsel not present - Pre Trial Conference held and concluded - defts motions to be made within 10 days - Govt has 5 days to respond. Case set for Trial on Sept. 29, 1972 at 10:30 am.
9-7-72	Letter dated 9-6-72 from Anthony Correrri, Esq. filed -received from Chambers re deft WALTER DAYS for adjournment, etc.
9-7-72	By WEINSTEIN J - Order filed -adjournment on consent granted for case to be placed on calendar for Sept. 28 at 10:30 am.
9-14-72	Petition for writ of habeas corpus ad prosequendum filed.

CRIMINAL DOCKET

DATE	PROCEEDINGS
9-28-72	Before WEINSTEIN, J. - Case called. Deft WALTER DAYS & counsel present.
	Deft withdraws his plea of not guilty and after having been advised of
	his rights by the court and on his own behalf enters a plea of guilty
	to count 2. Sentence adjourned without date. Bail continued.
9-29-72	Before WEINSTEIN J - Case called - adjd without date for Trial
	(DRUMMOND)
10-2-72	Writ ret'd and filed - Executed (WALTER DAYS)
10-3-72	Before Mishler, Ch J - Case called - Deft DENNIS DRUMMOND & counsel
	Barry Krinsky of Legal Aid present - motion by deft to dismiss count 8
	which is renumbered as count 1 - Motion denied - Both sides rest-
	Hearing concluded - Motion denied - Trial ordered and Begun.
	Jurors selected and sworn - deft to be tried on count 8 and cts. 9
	and 10 are severed - trial continued on Oct. 4 1972.
10-4-72	Before Mishler, Ch J. - Case called - Deft DENNIS DRUMMOND & counsel
	Barry Krinsky of Legal Aid present - Trial resumed - Motion by
	deft to dismiss count (8) which was renumbered as count (1) for
	the trial - Motion denied - Trial to be continued on Oct. 5, 1972.
10-5-72	Before MISHLER, CH.J. - Case called. - Deft DRUMMOND & counsel Barry
	Krinsky of Legal Aid present. Trial resumed. Motion of deft for a mis-
	trial denied. At 4:00 P.M. the jury retired for deliberations. At
	9:05 P.M. the jury returned & requested to be sent home & return for
	further deliberations on 10-6-72 at 9:45 A.M.
10-5-72	By MISHLER, CH.J. - Order of sustenance filed.
10-6-72	Stenographer's transcript filed dated 10-3-72.
10-6-72	Before MISHLER, CH.J. - Case called. Deft DRUMMOND & counsel Barry
	Krinsky of Legal Aid present. Trial resumed. - The jury retired for
	further deliberations at 10:05 A.M. Jury returned at 11:40 A.M. and
	could not reach a verdict. The court declared a mistrial. Jury dis-
	charged. Trial concluded.
10-13-72	Before Weinstein J - Case called - Deft DONALD DAYS & counsel
	Ira Cooper present. On motion of Asst U.S. Atty. Steckel
	the Indictment is dismissed.
10-13-72	By WEINSTEIN J - Order of dismissal filed (DONALD DAYS)
10-18-72	Before MISHLER, CH J - Case called - Deft DRUMMOND & counsel
	Barry Krinsky of Legal Aid present - Trial ordered & BEGUN.
	Jurors selected and sworn - trial to be continued on Nov. 1, 1972.
11-1-72	Before MISHLER, CH.J. - Case called. Deft DRUMMOND & counsel Barry
	Krinsky present. Trial resumed. Both sides open. Motion by deft

DATE	PROCEEDINGS
	DRUMMOND to dismiss the indictment. Motion is denied. Trial to be continued November 2, 1972, at 10 A.M.
1-2-72	Stenographers transcript dated Nov. 1, 1972 filed.
11-2-72	Before MISHLER, CH J - Case called - Deft DENNIS DRUMMOND & counsel Barry Krinsky of Legal Aid present - motion by deft for a Judgment of Acquittal - Motion denied - Jury retires for deliberations at 2:45 PM. Jury returns at 5:00 PM and renders its verdict of guilty on count 8- Jury polled and Jury discharged - Trial concluded - Bail conditions continued - sentence adjd without date - all motions reserved until time of sentence.
11-3-72	Letter from counsel for deft Walter Days filed dated 11-3-72 (removed from Chambers records and adjournment of sentence xxxxxxxxxxxxxxxxx)
11-8-72	By Weinstein, J. Order filed adjourning case for sentence of deft Walter Days 11-8-72 modified (See Order on file in Chambers)
11-8-72	Letter dated 11-3-72 from counsel for deft Walter Days filed (atty will be out of town from Nov. 12 to Nov. 19 and would therefore appreciate that sentence date for deft not be set for this period.) Parties notified as per instruction from Judge Weinstein.
12-15-72	Before MISHLER, CH J - Defts WALTER DAYS & DENNIS DRUMMOND present with counsels - deft DAYS sentenced to imprisonment on count 2 for 5 years pursuant to 18:4208(a)(2) and a 5 years special parole term . On motion of Asst US Atty Stec hel counts 1, 3, 4, 5, 6 & 7 are dismissed. Deft DRUMMOND sentenced to imprisonment on count 8 for 5 years pursuant to 18:4208(a)(2) and a 5 yearsspecial parole term - Clerk to file Notice of Appeal without fee =Bail continued pending appeal.
12-15-72	Judgment & Commitment filed for defts WALTER DAYS & DRUMMOND - certified copies to Marshal.
12-15-72	Notice of Appeal filed without fee (DRUMMOND)
12-15-72	Docket entries and duplicate copy of Notice of Appeal mailed to C of A (DRUMMOND)
12/20/72	Certified copy of Judgment and Commitment ret. and filed (deft DAYS) Deft delivered to Fed. Det. Hdqs.
12/26/72	Order redd and filed from the C. of A. that the record be docketed on or before 1/29/72 (as to deft DENNIS DRUMMOND)
1/2/73	By WEINSTEIN, J.- Order filed releasing bail (Donald Days)
1/29/73	Record on appeal certified and handed to Sandy Sadowitz for delivery to the Court of Appeals.
2-1-73	3 transcripts filed (PP. 1-447)

DATE	PROCEEDINGS
20/73	Acknowledgment recd from the C. of A. for Index to Record. (DRUMMOND)
20/73	Before MISHLER, CH. J.- Hearing held and concluded -court to review attvs voucher for commensation (WALTER DAYS)
20/73	By MISHLER, CH. J.- Memorandum of Decision and Order filed, the court denies the fee for legal research and brief, writing, travel time, etc. at the rate of \$.10 a mile. The reasonable time for arraignment, plea and sentence is about 6 hours, reimbursable at \$30.00 an hour is \$180.00 The reasonable time spent for interviews with the deft and in reviewing the records is approximately 5 hours reimbursable in the amount of \$100.00 The court has approved payment of the voucher in the amount of \$280.00 (WALTER DAYS)
16/73	Stenographer's transcript of Nov. 11, 12 and 15th, 1972 filed.
20/73	Notice of Motion filed (DONALD DAYS) re: for modifying sentence.
27/73	Before WEINSTEIN, J.- Case called- Deft DONALD DAYS not present- Counsel present- Motion for an order vacating or modifying sentence is denied.
-28-73	Stenographers transcript dated Oct. 6, 1972 filed (DENNIS DRUMMOND)
3-21-73	Stenographer's transcript dated 9-7-72 filed.
-26-73	2 Stenographers transcripts filed (one dated Oct. 3, 1972 at 9:15 AM and one dated Oct. 3, 1972 at 11:15 am)
-26-73	SUPPLEMENTAL INDEX to Record on Appeal certified and handed to S. Sddowitz of Legal Aid for delivery to the C of A (DRUMMOND)
9/19/73	Opinion and certified copy of Judgment received from Court of Appeals stating that the judgment of the District Court is reversed and that the action be and it hereby is remanded to the District Court for further proceedings in accordance with the opinion of the Court of Appeals (DENNIS DRUMMOND)
-12-74	Before TRAVIA J - case called & adjd to May 3, 1974 at 10:00 am for all purposes. (DRUMMOND)
4-16-74	Notice of Motion to dismiss filed (ret. May 3, 1974) DRUMMOND.
5-2-74	Affidavit of ETHAN LEVIN-EPSTEIN filed. (Drummond)
5-3-74	Before TRAVIA J - case called - motion to dismiss (DENNIS DRUMMOND) motion argued and motion denied.
5-3-74	Before TRAVIA J - case called - respectfully referred to Judge Platt (Dennis Drummond)
5-9-74	Stenographers Transcript dated 5-3-74 filed
31-74	Before PLATT, J.- Case called- Deft and counsel present- Adjd to 6-14-74 for motion to dismiss (DRUMMOND)

DATE

PROCEEDINGS

6-17-74 Notice of Motion filed ret. June 21 1974 for dismissal of the Indictment (deft Dennis Drummond)

6-21-74 Before Platt, J - case called- motion to dismiss as to deft Dennis Drummond argued - motion denied - adjd to July 12, 1974 to set a date for trial.

7-11-74 Before Platt, J. - Case called- Trial ordered & begun- Deft Dennis Drummond motion to dismiss - Denied- Jury selected & sworn- Trial cont'd to 7-15-74

7-15-74 Before PLATT, J - case called - trial resumed - Trial contd to 7-16-74.

7-16-74 Before PLATT, J - Case called - Trial resumed - Jury returns at 5:30 pm with a verdict of guilty as to count 8 - jury polled and discharged - defts motion for acquittal denied - trial concluded - sentence adjd without date.

7-22-74 Stenographers Transcript dated 7-11-74. 7-15-74 and 7-16-74 filed

7-30-74 Voucher for Expert Services filed (Dennis Drummond)

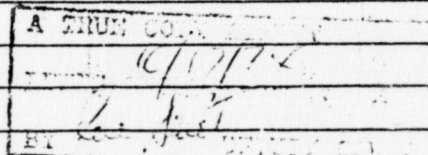
9-20-74 Before PLATT, J. - Case called- Deft DRUMMOND and counsel Marion Seltzer of Legal Aid present- Deft sentenced to imprisonment for a period of 5 years pursuant to T-18, U.S.C. Sec. 4208(a)(2), plus a special parole term of 5 years

9-20-74 Judgment and Commitment filed- certified copies to Marshal (DRUMMOND)

9-23-74 Notice of appeal filed(DRUMMOND)

9-23-74 Docket entries and duplicate of notice of appeal mailed to court of appeals (DRUMMOND)

10-17-74 Record on Appeal certified and handed to Phyllis Skloot Bamberger of Legal Aid Society for delivery to the C of A (DRUMMOND)



CLERK'S CERTIFICATE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

USA

VS

Don's Demand

74 CR 89

I, LEWIS ORGEL, Clerk of the United States District Court for the Eastern District of New York, do hereby certify that the foregoing copy of the Docket Entries from A to f and the original papers numbered from page 1 to 29 constitute the Record of Appeal.

I further testify that the last day to file said record is 10/17/74.

IN TESTIMONY WHEREOF, I have caused the seal of said Court to be hereunto affixed, at the Borough of Brooklyn in the Eastern District of New York, this 17th day of October

in the year of our LORD, One Thousand Nine Hundred and Seventy four and of the Independence of the United States One Hundred and Eighty sixth.

LEWIS ORGEL

CLERK

By:

DEPUTY CLERK

29

UNITED STATES OF AMERICA

- against -

WALTER DAYS,
DONALD DAYS, and
DENNIS DRUMMOND,

Defendants.

THE GRAND JURY CHARGES:

INDICTMENT

Crim. No. 72CR 650
(T. 21, U.S.C., §841(a)(1),
§846, T. 18, U.S.C. §2).

FILED
IN CLERK'S OFFICE
U. S. DISTRICT COURT E.D. N.Y.

★ JUN 1 1972 ★

COUNT ONE

TIME A.M. _____

On or about and between the 9th day of September, 1971, and the 10th day of February, 1972, within the Eastern District of New York, the defendants WALTER DAYS and DONALD DAYS did knowingly and wilfully conspire to commit an offense against the United States in violation of Title 21, United States Code, §841(a)(1), by conspiring to possess and distribute a quantity of heroin, a Schedule I narcotic drug controlled substance. (Title 21, United States Code, §846).

COUNT TWO

On or about the 9th day of September, 1971, within the Eastern District of New York, the defendants WALTER DAYS and DONALD DAYS did distribute approximately 20.8 grams of heroin, a Schedule I narcotic drug controlled substance. (Title 21, United States Code, §841(a)(1), and Title 18, United States Code, §2).

COUNT THREE

On or about the 9th day of September, 1971, within the Eastern District of New York, the defendants WALTER DAYS and DONALD DAYS did possess with intent to distribute approximately 20.8 grams of heroin, a Schedule I narcotic drug controlled substance. (Title 21, United States Code, §841(a)(1), and Title 18, United States Code, §2).

On or about the 13th day of January, 1972, within the Eastern District of New York, the defendants WALTER DAYS and DONALD DAYS did distribute approximately 29.7 grams of heroin, a Schedule I narcotic drug controlled substance. (Title 21, United States Code, §841(a)(1), and Title 18, United States Code, §2).

COUNT FIVE

On or about the 13th day of January, 1972, within the Eastern District of New York, the defendants WALTER DAYS and DONALD DAYS did possess with intent to distribute approximately 29.7 grams of heroin, a Schedule I narcotic drug controlled substance. (Title 21, United States Code, §841(a)(1), and Title 18, United States Code, §2).

COUNT SIX

On or about the 3rd day of February, 1972, within the Eastern District of New York, the defendants WALTER DAYS and DONALD DAYS did distribute approximately 117 grams of heroin, a Schedule I narcotic drug controlled substance. (Title 21, United States Code, §841(a)(1), and Title 18, United States Code, §2).

COUNT SEVEN

On or about the 3rd day of February, 1972, within the Eastern District of New York, the defendants WALTER DAYS and DONALD DAYS did possess with intent to distribute approximately 117 grams of heroin, a Schedule I narcotic drug controlled substance. (Title 21, United States Code, §841(a)(1), and Title 18, United States Code, §2).

COUNT EIGHT (1)

On or about the 10th day of February, 1972, within the Eastern District of New York, the defendants DONALD DAYS and DENNIS DRUMMOND did knowingly and wilfully conspire to commit an offense against the United States in violation of Title 21, United States Code, §841(a)(1) by conspiring to possess and distribute

approximately 125 grams of heroin, a Schedule I narcotic drug controlled substance. (Title 21, United States Code, §846).

COUNT NINE (3)

On or about the 10th day of February, 1972, within the Eastern District of New York, the defendant DENNIS DRUMMOND did knowingly and intentionally possess approximately .75 grams of cocaine hydrochloride, a Schedule II narcotic drug controlled substance, such narcotic drug controlled substance not having been obtained by the defendant DENNIS DRUMMOND directly, or pursuant to a valid prescription or order from a practitioner while acting in the course of his professional practice of otherwise according to law. (Title 21, United States Code, §844(a), and Title 18, United States Code, §2).

COUNT TEN (3)

On or about the 10th day of February, 1972, within the Eastern District of New York, the defendant DENNIS DRUMMOND did knowingly and intentionally possess approximately .25 grams of heroin, a Schedule I narcotic drug controlled substance, such narcotic drug controlled substance not having been obtained by the defendant DENNIS DRUMMOND directly, or pursuant to a valid prescription or order, from a practitioner while acting in the course of his professional practice of otherwise according to law. (Title 21, United States Code, §844(a), and Title 18, United States Code, §2).

COUNT ELEVEN

On or about the 10th day of February, 1972, within the Eastern District of New York, the defendant DONALD DAYS did possess with intent to distribute approximately 198.7 grams of marihuana, a Schedule I controlled substance. (Title 21, United States Code, §841(a)(1), and Title 18, United States Code, §2).

COUNT TWELVE

On or about the 10th day of February, 1972, within the Eastern District of New York, the defendant DONALD DAYS did possess with intent to distribute approximately 27 grams of cocaine hydrochloride, a Schedule II narcotic drug controlled substance. (Title 21, United States Code, §841(a)(1), and Title 18, United States Code, §2).

COUNT THIRTEEN

On or about the 10th day of February, 1972, within the Eastern District of New York, the defendant DONALD DAYS did possess with intent to distribute approximately 16 grams of heroin, a Schedule I narcotic drug controlled substance. (Title 21, United States Code, §841(a)(1), and Title 18, United States Code, §2).

A TRUE BILL

Charles F. Bell
FOREMAN

Robert A. M... ..
UNITED STATES ATTORNEY
EASTERN DISTRICT OF NEW YORK

(July 16, 1974)

(2:15 o'clock P.M.)

THE COURT: Are we ready?

MS. SELTZER: Yes.

MR. CORCORAN: Yes, your Honor.

THE COURT: All right.

Hang up the sign.

Have the jury brought in.

(The jury took its place in the jury box.)

CHARGE OF THE HONORABLE THOMAS C. PLATT, UNITED
STATES DISTRICT JUDGE:

THE COURT: Ladies and gentlemen of the jury:

I am going to charge you on the law. It is
my practice to read the Charge to minimize the
possibility of error. I realize it is harder to
follow instructions which are read rather than
instructions which are given extemporaneously, but
I ask you to bear with me and listen as closely
as you can to the law as I give it to you on this
case.

Now that you have heard the evidence and the
arguments it becomes my duty to give the instructions
of the Court as to the law applicable to this case.

1
2 It is your duty as jurors to follow the law
3 as stated in the instructions of the Court, and to
4 apply the rules of law so given to the facts as you
5 find them from the evidence in the case.

6 You are not to single out one instruction alone
7 as stating the law, but must consider the instruc-
8 tions as a whole.

9 Neither are you to be concerned with the
10 wisdom of any rule of law stated by the Court.
11 Regardless of any opinion you may have as to what
12 the law ought to be, it would be a violation of
13 your sworn duty to base a verdict upon any other
14 view of the law than that given in the instruction
15 of the Court; just as it would be a violation of
16 your sworn duty, as judges of the facts, to base
17 a verdict upon anything but the evidence in the
18 case.

19 You must not permit yourselves to be
20 governed by sympathy, bias, prejudice or any other
21 considerations not founded on the evidence and these
22 instructions on the law.

23 Justice through trial by jury must always
24 depend upon the willingness of each individual juror
25 to seek the truth as to the facts from the same

1
2 evidence presented to all the jurors; and to arrive
3 at a verdict by applying the same rules of law, as
4 given in the instructions of the Court.

5 You have been chosen and sworn as jurors in
6 this case to try the issues of fact presented by
7 the allegations of the indictment (information) and
8 the denial made by the "Not-Guilty" plea of the
9 accused. You are to perform this duty without bias
10 or prejudice as to any party. Again, the law does
11 not permit jurors to be governed by sympathy, pre-
12 judice, or public opinion. Both the accused and
13 the public expect that you will carefully and
14 impartially consider all the evidence in the case,
15 follow the law as stated by the Court and reach
16 a just verdict, regardless of the consequences.

17 I am not sending the exhibits which have
18 been received in evidence with you as you retire for
19 your deliberations. You are entitled, however, to
20 see any or all of these exhibits as you consider
21 your verdict. I suggest that you begin your
22 deliberations and then, if it would be helpful to
23 you, you may ask for any or all of the exhibits
24 simply by sending a note to me through one of the
25 deputy marshals who will be outside the door of

1
2 your deliberating room.

3 The law presumes a defendant to be innocent
4 of crime. Thus a defendant, although accused,
5 begins the trial with a "clean slate" -- with no
6 evidence against him. And the law permits nothing
7 but legal evidence presented before the jury to be
8 considered in support of any charge against the
9 accused. So the presumption of innocence alone is
10 sufficient to acquit a defendant, unless the jurors
11 are satisfied beyond a reasonable doubt of the
12 defendant's guilt after careful and impartial con-
13 sideration of all the evidence in the case.

14 It is not required that the Government prove
15 guilt beyond all possible doubt. The test is one
16 of reasonable doubt. A reasonable doubt is a doubt
17 based upon reason and common sense -- the kind of
18 doubt that would make a reasonable person hesitate
19 to act. Proof beyond a reasonable doubt must,
20 therefore, be proof of such a convincing character
21 that you would be willing to rely and act upon it
22 unhesitatingly in the most important of your own
23 affairs.

24 The jury will remember that a defendant is
25 never to be convicted on mere suspicion or

1
2 conjecture.

3 The burden is always upon the prosecution
4 to prove guilt beyond a reasonable doubt. This
5 burden never shifts to a defendant; for the law
6 never imposes upon a defendant in a criminal case
7 the burden or duty of calling any witnesses or
8 producing any evidence.

9 So, if the jury views the evidence in the
10 case as reasonably permitting either of two
11 conclusions -- one of innocence, the other of guilt
12 -- the jury should, of course, adopt the conclusion
13 of innocence.

14 Again, a reasonable doubt means a doubt
15 sufficient to cause a prudent person to hesitate
16 to act in the most important affairs of his or her
17 life. Finding a citizen to be guilty of a crime
18 and subjecting him to criminal penalties is a very
19 serious matter. You will consider this fact in
20 deciding whether or not you have a reasonable doubt.

21 An indictment is but a method of accusing
22 a defendant of a crime. It is not evidence of any
23 kind against the accused.

24 There are two types of evidence from which
25 a jury may properly find a defendant guilty of a

1
2 crime. One is direct evidence -- such as the
3 testimony of any eyewitness. The other is circum-
4 stantial evidence -- the proof of facts and
5 circumstances which rationally imply the existence
6 or non-existence of other facts because such other
7 facts usually follow according to the common experi-
8 ence of mankind. Thus, the footprint of a man in
9 the sand implied to Robinson Crusoe that there was
10 another man with him on the desert island and indeed
11 there was, the man Friday.

12 Thus on the one hand, you may have direct
13 evidence of the issue and on the other hand you may
14 have circumstantial evidence of the issue. The law
15 does not hold that one type of evidence is
16 necessarily of better quality than the other. The
17 law requires only that the Government prove its
18 case beyond reasonable doubt both on the direct and
19 circumstantial evidence.

20 At times the jury might feel that circum-
21 stantial evidence is of better quality. At other
22 times they may feel direct evidence is of better
23 quality. That judgment is left entirely to you.

24 As a general rule, the law makes no dis-
25 tinction between direct and circumstantial evidence,

1
2 but simply requires that, before convicting a de-
3 fendant, the jury be satisfied of the defendant's
4 guilt beyond a reasonable doubt from all the evidence
5 in the case.

6 Now, it is charged in the indictment that
7 on or about the 10th day of February, 1972, within
8 the Eastern District of New York, the defendant,
9 Dennis Drummord and one Donald Days did knowingly
10 and wilfully conspire to commit an offense against
11 the United States in violation of Title 21, Unites
12 States Code, Section 841(a)(1) by conspiring to
13 possess and distribute approximately 125 grams of
14 heroin, a Schedule I narcotic drug controlled
15 substance. (Title 21, United States Code, Section
16 846). As indicated, this indictment charges a
17 violation of Section 841(a)(1) and 846 of Title 21
18 of the United States Code.

19 Section 846 provides that:

20 "Any person who attempts or conspires to
21 commit any offense defined in this subchapter is
22 in violation of the Code."

23 Section 841(a)(1) is part of the subchapter
24 and provides in pertinent part:

25 "...it shall be unlawful for any person
knowingly or intentionally (1) to...distribute,

1
2 or possess with intent to distribute,...a narcotic
3 controlled substance in Schedule I".

4 Such Schedule I includes a narcotic drug
5 known as heroin.

6 The essential elements of the crime are as
7 follows:

8 1. That the conspiracy described in the
9 indictment was wilfully formed and existed at or
10 about the time alleged.

11 2. That the defendant and Donald Days wilfully
12 formed such a conspiracy for the purposes of possess-
13 ing and distributing heroin.

14 3. That the defendant knowingly and wilfully
15 became a member of the conspiracy.

16 4. That the defendant and Donald Days
17 thereafter knowingly committed an overt act in
18 pursuance of the conspiracy and that such act was
19 knowingly done in furtherance of the object or purpose
20 of the conspiracy.

21 If the jury finds beyond a reasonable doubt
22 from the evidence in the case that the existence of
23 the conspiracy charged in the indictment has been
24 proved, and that during the existence of the conspiracy
25 an overt act was knowingly done by one of the

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2 conspirators in furtherance of some object or
3 purpose of the conspiracy, then proof of the
4 conspiracy offense charged is complete and it is
5 complete as to every member found by the jury to
6 have been wilfully a member of the conspiracy at
7 the time the overt act was committed, regardless
8 of which of the conspirators did the overt act.

9 As stated before, the burden is always upon
10 the prosecution to prove beyond a reasonable doubt
11 every essential element of the crime charged; the
12 law never imposes upon the defendant in a criminal
13 case the burden or duty of calling any witnesses
14 or produce any evidence.

15 Now, what is a conspiracy?

16 A conspiracy is a combination of two or more
17 persons, by concerted action, to accomplish some
18 unlawful purpose. So, a conspiracy is a kind of
19 "partnership in criminal purposes", in which each
20 member becomes the agent of every other member. The
21 gist of the offense, is a combination or agreement
22 to disobey, or to disregard, the law.

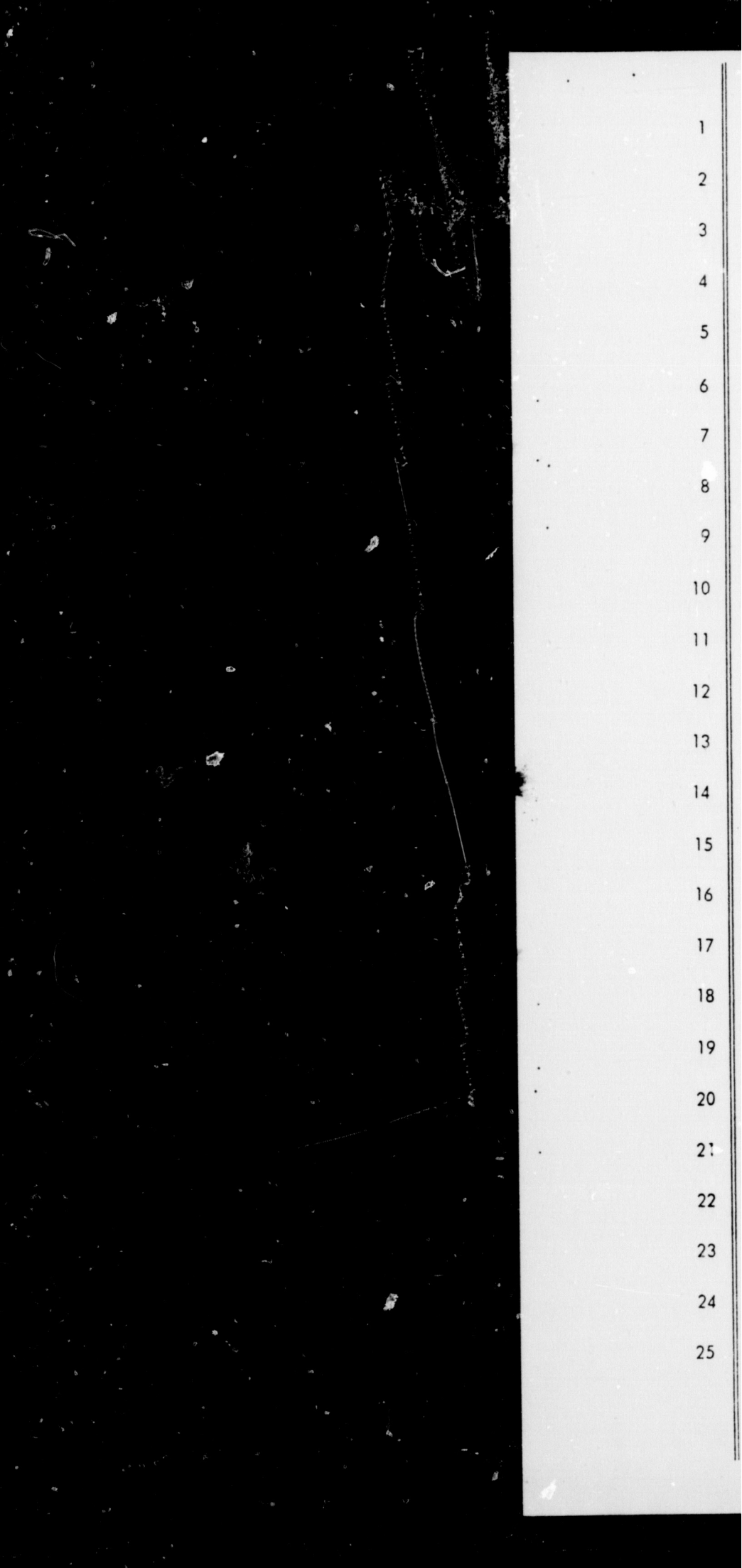
23 Mere similarity of conduct among various
24 persons, and the fact they may have associated with
25 each other, and may have assembled together and

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2 and discussed common aims and interests, does not
3 necessarily establish proof of the existence of
4 a conspiracy.

5 However, the evidence in the case need not
6 show that the members entered into any express or
7 formal agreement, or that they directly, by words
8 spoken or in writing, stated between themselves
9 what their object or purpose was to be, or the
10 details thereof, or the means by which the object
11 or purpose was to be accomplished.

12 What the evidence in the case must show
13 beyond a reasonable doubt, in order to establish
14 proof that a conspiracy existed, is that the members
15 in some way or manner, or through some contrivance,
16 positively or tacitly came to a mutual understanding
17 to try to accomplish a common and unlawful plan.

18 The evidence in the case need not establish
19 that all the means or methods set forth in the
20 indictment were agreed upon to carry out the
21 alleged conspiracy; nor that all means or methods,
22 which were agreed upon, were actually used or put
23 into operation; nor that all of the persons charged
24 to have been members of the alleged conspiracy
25 were such.

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What the evidence in the case must establish beyond a reasonable doubt is that the alleged conspiracy was knowingly formed, and that one or more of the means or methods described in the indictment were agreed upon to be used, in an effort to effect or accomplish some object or purpose of the conspiracy, as charged in the indictment; and that two or more persons, including the accused, were knowingly members of the conspiracy, as charged in the indictment.

In your consideration of the evidence in the case as to the offense of conspiracy charge, you should first determine whether or not the conspiracy existed, as alleged in the indictment. If you conclude that the conspiracy did exist, you should next determine whether or not each of the accused wilfully became a member of the conspiracy.

If it appears beyond a reasonable doubt from the evidence in the case that the conspiracy alleged in the indictment was wilfully formed, and that a defendant lawfully became a member of the conspiracy either at its inception or afterwards, and that thereafter, one or more of the conspirators committed one or more overt acts in furtherance of some object or purpose of the conspiracy, then there

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2 What the evidence in the case must establish
3 beyond a reasonable doubt is that the alleged con-
4 spiracy was knowingly formed, and that one or more
5 of the means or methods described in the indictment
6 were agreed upon to be used, in an effort to effect or
7 accomplish some object or purpose of the conspiracy,
8 as charged in the indictment; and that two or more
9 persons, including the accused, were knowingly mem-
10 bers of the conspiracy, as charged in the indictment.

11 In your consideration of the evidence in the
12 case as to the offense of conspiracy charge, you
13 should first determine whether or not the conspiracy
14 existed, as alleged in the indictment. If you con-
15 clude that the conspiracy did exist, you should next
16 determine whether or not each of the accused wilfully
17 became a member of the conspiracy.

18 If it appears beyond a reasonable doubt from
19 the evidence in the case that the conspiracy alleged
20 in the indictment was wilfully formed, and that a de-
21 fendant lawfully became a member of the conspiracy
22 either at its inception or afterwards, and that
23 thereafter, one or more of the conspirators
24 committed one or more overt acts in furtherance of
25 some object or purpose of the conspiracy, then there

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2 may be a conviction even though the conspirators may
3 not have succeeded in accomplishing their common
4 object or purpose and in fact, may have failed so
5 doing.

6 The extent of any defendant's participation,
7 moreover, is not determinative of his guilt or
8 innocence. A defendant may be convicted as a
9 conspirator even though he may have played only a
10 minor part in the conspiracy.

11 Now, I have referred to an overt act. An
12 "over act" is any act knowingly committed by one of
13 the conspirators, in an effort to effect or accom-
14 plish some object or purpose of the conspiracy. The
15 overt act need not be criminal in nature, if consid-
16 ered separately and apart from the conspiracy. It
17 may be as innocent as the act of a man walking
18 across the street, or driving an automobile, or
19 using a telephone. It must, however, be an act which
20 follows and tends toward accomplishment of the plan
21 or scheme, it must be knowingly done in furtherance
22 of some object or purpose of the conspiracy charged
23 in the indictment.

24 One may become a member of the conspiracy
25 without full knowledge of all the details of the

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2 done during the continuancy of such conspiracy, and
3 in furtherance of some object or purpose of the
4 conspiracy.

5 Otherwise, any admission or incriminatory
6 statement made or act done outside of court, by one
7 person, may not be considered as evidence against
8 any person who is not present and did not hear the
9 statement made, or see the act done.

10 Thereafter, statements of any conspirator,
11 which are not in furtherance of the conspiracy, or
12 made before its existence, or after its termination,
13 may be considered as evidence only against the person
14 making it.

15 The indictment charges a conspiracy among the
16 defendants Dennis Drummond and Donald Days, both of
17 whom are named in the indictment as co-conspirators.
18 A person cannot conspire with himself and therefore
19 you cannot find any of the defendants guilty unless
20 you find beyond a reasonable doubt that he
21 participated in the conspiracy as charged with at
22 least one other person.

23 Now, with respect to the question of intent:

24 Intent ordinarily may not be proved directly,
25 because there is no way of fathoming or scrutinizing

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2 the operations of the human mind. But you may infer
3 the defendant's intent from the surrounding cir-
4 cumstances. You may consider any statement made and
5 done or omitted by the defendant, and all other facts
6 and circumstances in evidence which indicate his
7 state of mind. It is ordinarily reasonable to infer
8 that a person intends the natural and probable
9 consequences of acts knowingly done or knowingly
10 omitted.

11 Now you will recall at the outset of the trial,
12 I gave you the so-called limiting instructions which
13 pertained to the events that took place on February
14 3rd as distinguished from February 10th. I am
15 going to give you this specific instruction with
16 respect to those events now :

17 The fact that the accused may have committed
18 an offense at some time is not any evidence or proof
19 whatever that, at a later time, the accused committed
20 the offense charged in the indictment, even though
21 both offenses are of a like nature. Evidence as to
22 an alleged earlier offense of a like nature may not
23 therefore, be considered by the jury, in determining
24 whether the accused did the act charged in the
25 indictment. Nor may such evidence be considered for

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2 any other purpose whatever, unless the jury first
3 find that other evidence in the case, standing alone,
4 establishes beyond a reasonable doubt that the
5 accused did the act charged in the indictment.

6 If the jury should find beyond a reasonable
7 doubt from the other evidence in the case that the
8 accused did the act charged in the indictment, then
9 the jury may consider evidence as to an alleged
10 earlier offense of a like nature, in determining
11 the state of mind or intent with which the accused
12 did the act charged in the indictment. And where
13 all the elements of an alleged earlier offense of a
14 like nature are established by evidence which is
15 clear and conclusive, the jury may, but is not obliged
16 to, draw the inference and find that in doing the
17 act charged in the indictment, the accused acted
18 wilfully and with specific intent, and not because of
19 mistake or accident or other innocent reason.

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2 THE COURT: (continuing) Now, the guilt of
3 a defendant may be established without proof that
4 the accused personally did every act constituting the
5 offense charged.

6 Section 2 of Title 18 of the United States Code
7 provides that:

8 "Whoever commits an offense against the
9 United States, or aids, abets, counsels, commands,
10 induces, or procures its commission, is punishable as
11 a principal.

12 "Whoever wilfully causes an act to be done,
13 which if directly performed by him or another would be
14 an offense against the United States, is punishable as
15 a principal."

16 In other words, every person who wilfully
17 participates in the commission of a crime may be
18 found to be guilty of that offense. Participation is
19 wilful if done voluntarily and intentionally, and
20 with the specific intent to do something the law
21 forbids, or with the specific intent to fail to do
22 something the law requires to be done; that is to say,
23 with bad purpose either to disobey or to disregard the
24 law.

25 In order to aid and abet another to commit a

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2 crime, it is necessary that the accused wilfully
3 associate himself in some way with the criminal
4 venture, and wilfully participate in it as he would
5 in something he wishes to bring about; that is to
6 say, that he wilfully seek by some act or omission of
7 his to make the criminal venture succeed.

8 An act or omission is "wilfully" done, if
9 voluntarily and intentionally and with the specific
10 intent to do something the law forbids, or with
11 the specific intent to fail to do something the law
12 requires to be done; that is to say, with bad purpose
13 either to disobey or to disregard the law.

14 You, of course, may not find the defendant
15 guilty unless you find beyond a reasonable doubt
16 that every element of the offense as defined in these
17 instructions was committed by some person or persons,
18 and that the defendant participated in its commission.

19 Mere presence at the scene of the crime and
20 knowledge that a crime is being committed are not
21 sufficient to establish that the defendant aided and
22 abetted the crime, unless you find beyond a reasonable
23 doubt that the defendant was a participant and not
24 merely a knowing spectator.

25 An act is done "knowingly" if done voluntarily
and intentionally, and not because of mistake or

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2 accident or other innocent reason.

3 The purpose of adding the word "knowing" was
4 to insure that no one would be convicted for an
5 act done because of mistake, or accident, or other
6 innocent reason.

7 As stated before, with respect to an offense
8 such as charged in this case, specific intent must
9 be proved beyond a reasonable doubt before there
10 can be a conviction.

11 An act is done "wilfully" if done voluntarily
12 and intentionally, and with the specific intent to
13 do something the law forbids; that is to say, with
14 bad purpose either to disobey or to disregard the law.

15 Now, as I have said to -ou before, statements
16 and arguments of counsel are not evidence in the case,
17 unless made as an admission or stipulation of fact.
18 When the attorneys on both sides stipulated or
19 agreed as to the existence of a fact, such as I think
20 they stipulated that the white powder which was a
21 part of the February 3rd transaction was heroin, you
22 must, unless otherwise instructed, accept the
23 stipulation as evidence, and regard that fact as
24 proved.

25 Unless you are otherwise instructed, the

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2 evidence in the case always consists of the sworn
3 testimony of the witnesses, regardless of who may
4 have called them; and all exhibits received in
5 evidence, regardless of who may have produced them;
6 and all facts which may have been admitted or
7 stipulated; and all facts and events which may have
8 been judicially noticed; and all applicable
9 presumptions stated in these instructions.

10 Any evidence as to which an objection was
11 sustained by the Court, and any evidence ordered
12 stricken by the Court, must be entirely disregarded.

13 Evidence does not include, however, what is
14 brought out from witnesses on cross examination as
15 well as what is testified to on direct examination.

16 Unless you are otherwise instructed, anything
17 you may have seen or heard outside the courtroom is
18 not evidence, and must be entirely disregarded.

19 You are to consider only the evidence in the
20 case and your verdict is to be based on the evidence
21 only. But in your consideration of the evidence, you
22 are not limited to the bald statements of the
23 witnesses. In other words, you are not limited solely
24 to what you see and hear as the witnesses testify.
25 You are permitted to draw, from facts which you find

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2 have been proved, such reasonable inferences as you
3 feel are justified in the light of your experience.

4 Inferences are deductions or conclusions
5 which reason and common sense lead the jury to draw
6 from facts which have been established by the evidence
7 in the case.

8 If a lawyer asks a witness a question which
9 contains an assertion of fact, you may not consider
10 the assertion as evidence of that fact. The lawyers'
11 statements are not evidence.

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1 THE COURT: (Continuing.) Evidence has been
2 introduced tending to establish an alibi, which amounts
3 to a contention that the defendant was not present
4 at the time when or at the place where he is alleged
5 to have committed the offense charged in the indict-
6 ment.
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8 If, after consideration of all the evidence
9 in the case, you have-a reasonable doubt as to whether
10 the defendant was present at the time and place the
11 alleged offense was committed, you must acquit him.

12 The jury will always bear in mind that the
13 law never imposes upon a defendant in a criminal case
14 the burden or duty of calling any witnesses or pro-
15 ducing any evidence.

16 You, as jurors, are the sole judges of the
17 credibility of the witnesses and the weight their
18 testimony deserves.

19 You should carefully scrutinize all the
20 testimony given, the circumstances under which each
21 witness has testified, and every matter in evidence
22 which tends to show whether a witness is worthy of
23 belief. Consider each witness' intelligence, motive
24 and state of mind, and demeanor and manner while on
25 the stand. Consider the witness' ability to observe

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2 the matters as to which he has testified and whether
3 he impresses you as having an accurate recollection
4 of these matters. Consider also any relation each
5 witness may bear to either side of the case; the
6 manner in which each witness might be affected by
7 the verdict; and the extent to which, if at all, each
8 witness is either supported or contradicted by other
9 evidence in the case.

10 Inconsistencies or discrepancies in the
11 testimony of a witness, or between the testimony of
12 different witnesses, may or may not cause the jury to
13 discredit such testimony. Two or more persons wit-
14 nessing an incident or a transaction may see or hear
15 it differently; and innocent misrecollection, like
16 failure of recollection, is not an uncommon experience.
17 In weighing the effect of a discrepancy, always con-
18 sider whether it pertains to a matter of importance
19 or an unimportant detail, and whether the discrepancy
20 results from innocent error or intentional falsehood.
21 On the one hand, you have direct evidence of the issue
22 and on the other hand you may have circumstantial
23 evidence of the issue. The law does not hold that one
24 type of evidence is necessarily of better quality than
25 the other. The law requires only that the Government

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2 prove its case beyond a reasonable doubt both on the
3 direct and circumstantial evidence. At times the
4 jury might feel that circumstantial evidence is of
5 better quality. At other times they may feel direct
6 evidence is of better quality. That judgment is
7 left entirely to you.

8 After making your own judgment, you will give
9 the testimony of each witness such credibility, if
10 any, as you may think it deserves.

11 The testimony of a witness may be discredited
12 or impeached by showing that he previously made state-
13 ments which are inconsistent with his present
14 testimony. The earlier contradictory statements are
15 admissible only to impeach the credibility of the
16 witness, and not to establish the truth of these
17 statements. It is the province of the jury to
18 determine the credibility, if any, to be given the
19 testimony of a witness who has been impeached.

20 If a witness is shown knowingly to have
21 testified falsely concerning any matter, you have a
22 right to distrust such witness' testimony in other
23 particulars; and you may reject all the testimony of
24 that witness or give it such credibility as you may
25 think it deserves.

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2 An act or omission is "knowingly" done, if
3 done voluntarily and intentionally, and not because
4 of mistake or accident or other innocent reason.

5 The testimony of a witness may be discredited
6 or impeached by showing that the witness has been
7 convicted of a felony, that is, of a crime punishable
8 by imprisonment for a term of years. Prior con-
9 viction does not render a witness incompetent to
10 testify, but is merely a circumstance which you may
11 consider in determining the credibility of the
12 witness. It is the province of the jury to determine
13 the weight to be given to any prior conviction as
14 impeachment.

15 A defendant who wishes to testify, however,
16 is a competent witness; and the defendant's testimony
17 is to be judged in the same way as that of any other
18 witness.

19 It is the duty of the attorney on each side
20 of a case to object when the other side offers
21 testimony or other evidence which the attorney believes
22 is not properly admissible. You should not show
23 prejudice against an attorney or his client because
24 the attorney has made objections.

25 Upon allowing testimony or other evidence to

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2 be introduced over the objection of an attorney,
3 the Court does not, unless expressly stated, indicate
4 any opinion as to the weight or effect of such
5 evidence. As stated before, the jurors are the sole
6 judges of the credibility of all witnesses and the
7 weight and effect of all evidence.

8 When the Court has sustained an objection to
9 a question addressed to a witness, the jury must
10 disregard the question entirely, and may draw no
11 inference from the wording of it, or speculate as to
12 what the witness would have said if he had been
13 permitted to answer any question.

14 You are here to determine the guilt or
15 innocence of the accused from the evidence in the
16 case. You are not called upon to return a verdict
17 as to the guilt or innocence of any other person or
18 persons. So, if the evidence in the case convinces
19 you beyond a reasonable doubt of the guilt of the
20 accused, you should so find, even though you may
21 believe one or more other persons are guilty. But
22 if any reasonable doubt remains in your minds after
23 impartial consideration of all the evidence in the
24 case, it is your duty to find the accused not guilty.

25 The verdict must represent the considered

1 judgment of each juror. In order to return a verdict,
2 it is necessary that each juror agree thereto. Your
3 verdict must be unanimous.
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5 It is your duty, as jurors, to consult with
6 one another, and to deliberate with a view to reaching
7 an agreement, if you can do so without violence to
8 individual judgment. Each of you must decide the case
9 for himself, but do so only after an impartial
10 consideration of the evidence in the case with your
11 fellow jurors. In the course of your deliberations,
12 do not hesitate to reexamine your own views, and change
13 your opinion, if convinced it is erroneous. But do
14 not surrender your honest conviction as to the weight
15 or effect of evidence, solely because of the opinion
16 of your fellow jurors, or for the mere purpose of
17 returning a verdict.

18 If any reference by the Court or by counsel
19 to matters of evidence does not coincide with your
20 own recollection, it is your recollection which
21 should control during your deliberations.

22 The punishment provided by law for the
23 offenses charged in the indictment is a matter of
24 exclusively within the province of the Court, and
25 should never be considered by the jury in any way, in

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2 arriving at an impartial verdict as to the guilt or
3 innocence of the accused.

4 Upon retiring to the jury room, you madam,
5 who are sitting nearest to me in the front row, will
6 act as foreman of the jury unless you elect not to
7 do so, in which case other members and yourself will
8 elect a foreman. The foreman will preside over your
9 deliberations and will be your spokesman here in
10 Court.

11 Remember at all times, you are not partisans.
12 You are judges -- judges of the facts. Your sole
13 interest is to seek the truth from the evidence in
14 the case.

15 There is nothing peculiarly different in
16 the way a jury should consider the evidence in a
17 criminal case, from that in which all reasonable
18 persons treat any question depending upon evidence
19 presented to them. You are expected to use your good
20 sense; consider the evidence in the case for only
21 those purposes for which it has been admitted, and
22 give it a reasonable and fair construction, in the
23 light of your common knowledge of the natural
24 tendencies and inclinations of human beings.

25 If the accused be proved guilty beyond a

reasonable doubt, say so. If not so proved guilty, say so.

If it becomes necessary during your deliberations to communicate with the Court, you may send a note by a bailiff, signed by your foreman, or by one or more members of the jury. No member of the jury should ever attempt to communicate with the Court by any means other than a signed writing and the Court will never communicate with any member of the jury on any subject touching the merits of the case, otherwise than in writing, or orally here in open Court.

You will note from the oath about to be taken by the bailiffs that they too, as well as all other persons, are forbidden to communicate in any way or manner with any member of the jury on any subject touching the merits of the case.

Bear in mind also that you are never to reveal to any person -- not even to the Court -- how the jury stands, numerically or otherwise, on the question of the guilt or innocence of the accused, until after you have reached an unanimous verdict.

Now, ladies and gentlemen:

I am going to send you into the next room for

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2 five minutes or thereabouts, during which time we
3 will get the deputy marshal up here, and I will
4 also discuss the Charge with the attorneys. During
5 this time, please do not discuss the case, wait
6 until I have given you the final okay, we will bring
7 you back first and then send you out and you can
8 begin your deliberations.

9 So will you retire now just for five minutes
10 or so, then I will get you back.

11 (At 2:55 o'clock p.m. the jury left the
12 Courtroom.)

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1 THE COURT: All right, Miss Seltzer.

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2 MISS SELTZER: Your Honor, I had a little
3 trouble following your limiting instruction on the
4 admissibility of the February 3rd evidence. I can't
5 point out a particular objection that I have because I
6 was just a little confused while I was listening to it.

7 THE COURT: It is a standard instruction on
8 taking prior evidence of a prior crime, on the question
9 of intent only, and I took it out of the standard
10 instructions book, and I thought that was the only fair
11 way to treat it in this case.

12 MISS SELTZER: Also on the question of alibi, I
13 am not sure but that what we interposed was an alibi.

14 THE COURT: Would you rather have me take it out
15 of the category of alibi? That is what I thought it
16 was offered as.

17 MISS SELTZER: Well, strictly -- I hadn't really
18 thought about what the strict terms of the defense were,
19 it wasn't -- in other words, on February 3rd, we didn't
20 put Mr. Drummond as being in any particular place at
21 any particular time, on February 10th he was at the
22 residence, he was not on the first floor, so we would
23 contend if that is an alibi that he was on the second
24 floor rather than the first floor, well --

25 THE COURT: The alibi testimony was from

1 Mr. Clark, as I understand it, and it was offered, as I
2 saw it, and maybe I am mistaken as to the way I saw it,
3 but it seems as if it were offered as an alibi for his
4 having the cash in his possession.

5 MISS SELTZER: But as I see it the charge is,
6 the only charge relates to February 10th, and then if
7 this evidence is admitted as to February 3rd --

8 THE COURT: It is the Government's contention,
9 as I understand it, Miss Seltzer, that the money, the
10 \$2,900 was given to your client on February 10th, and
11 Mr. Clark, as I assume perhaps erroneously, I assume
12 was the alibi for that link to February 10th.

13 Now am I not correct?

14 MR. CORCORAN: Moreover, your Honor, I believe
15 the defendant is contending he was not present to
16 receive the money, he was not in the basement. I would
17 think that was an alibi.

18 THE COURT: And not only that, Davis and his
19 wife, that was all alibi testimony in that sense.

20 MISS SELTZER: I had not thought of this in
21 those terms.

22 Also, there was an instruction as to the fact
23 that somebody who is convicted of a felony or has been
24 convicted of a felony -- I don't remember your exact
25 words, that that can be taken into consideration by the

1 Jury.

3 2 THE COURT: As I understand, the witness Clark
3 had two prior convictions both of which were read into
4 the evidence this morning.

5 MISS SELTZER: I would have subpoenaed the
6 chart, that would make the most sense.

7 THE COURT: You see, they don't have to consider
8 it, but they may consider it on the question of his
9 credibility.

10 MISS SELTZER: And I also wonder if perhaps we
11 can tell the Jury that if they want, they may have the
12 testimony read back. I don't think any mention was
13 made of that.

14 THE COURT: I will be glad to do that, if you
15 wish.

16 MISS SELTZER: Yes, thank you.

17 THE COURT: Anything else?

18 MISS SELTZER: No.

19 THE COURT: Mr. Corcoran?

20 MR. CORCORAN: No, I have nothing.

21 THE COURT: All right, bring them back.

22 Miss Seltzer, would you rather, would you rather
23 that I take the word "alibi" out, does it bother you
24 that much?

25 Do you want me to read that instruction?

1 MISS SELTZER: Could you perhaps re-read it now,
2 I'm not quite sure I understood the whole thing.

4 3 I don't think that the Clark testimony in any
4 event relates to an alibi.

5 THE COURT: I think it does to the money.

6 I will read it:

7 "Evidence has been introduced tending to
8 establish an alibi, which amounts to a contention that
9 the defendant was not present at the time when or at
10 the place where he is alleged to have committed the
11 offense charged in the indictment.

12 "If, after consideration of all the evidence in
13 the case, you have a reasonable doubt as to whether
14 the defendant was present at the time and place the
15 alleged offense was committed, you must acquit him.

16 "The Jury will always bear in mind that the law
17 never imposes upon a defendant in a criminal case the
18 burden or duty of calling any witnesses or producing
19 any evidence."

20 MISS SELTZER: All right, all right, as long as
21 it relates --

22 THE COURT: I think that is very much in your
23 favor.

24 MISS SELTZER: Yes.

25 If so, I am withdrawing any objection.

1 THE COURT: Bring the Jury in.

5 2 I see that the Marshal is here.

3 I want you to swear him in in the presence of
4 the Jury, I want to have the Jury see that he is sworn
5 in.

6 (At 3:15 o'clock p.m., the Jury took its place
7 in the Jury Box.)

8 THE COURT: All right now, ladies and gentlemen
9 of the Jury:

10 I have been asked to remind you and to tell you
11 that if you wish to have any portion of any witnesses'
12 testimony re-read, you may have it, or any portion at
13 all of any witness or all of the testimony re-read, if
14 you wish it, but I don't believe that should be
15 necessary, the trial wasn't that long. If you wish
16 some clarification, please inform me, or if you get in-
17 to a dispute as to who said what, then you may have
18 that designated portion of the testimony re-read.

19 As I said during my charge, you may ask for any
20 or all of the exhibits, if you wish them.

21 Would you please swear in the Marshal.

22 THE CLERK: Will you please step over here?

23 (At this point the Marshal was sworn in.)

24 THE COURT: All right, you may retire, ladies
25 and gentlemen of the Jury, except for the two alternates

1 who will come up here to receive their cards.

6 2 Thank you for your service, it is very much
3 appreciated even though you are not going to be part of
4 the deliberations.

5 (At 3:20 o'clock p.m., the Jury left the Court-
6 room.)

7 THE COURT: Miss Seltzer and Mr. Corcoran:

8 If it is agreeable with you, I would think that
9 we might give them till about 5:30, and if they have
10 not reached a verdict or are not about to reach a
11 verdict, bring them back tomorrow.

12 I am willing to sit tonight if you wish.

13 MISS SELTZER: I have no plans, I am willing to
14 stay if you want to.

15 THE COURT: I have often worried, I don't think
16 it helps matters to try and make a Jury deliberate till
17 9:00, 10:00 or 11:00 o'clock at night. On the last
18 case which I had, I was almost certain it was going to
19 take a full 24 hours, and we sent them home at a quarter
20 to six and then at 4:30 the next day, they reached a
21 verdict. I think that is a little bit more human.

22 But I am willing to do whatever you wish.

23 MR. CORCORAN: I see no reason to keep them
24 beyond five-thirty, if they haven't reached a verdict
25 then there is no reason for them not to come back
tomorrow, they will have to come back.

1 MISS SELTZER: I am willing to do whatever you
2 want.

7 3 MR. CORCORAN: Your Honor, what shall we do with
4 respect to the heroin and the money?

5 THE COURT: We had better talk about that a
6 little bit.

7 The money, particularly if they call for all of
8 the exhibits, would it be agreeable to you, Miss
9 Seltzer, if they were going to examine the money, if
10 they do so only with the Marshal present, he will take
11 the money in and let them examine it individually or
12 collectively, then have the Marshal collect it and send
13 it back out.

14 MISS SELTZER: Yes.

15 THE COURT: The heroin the same way.

16 MISS SELTZER: Sure.

17 THE COURT: Would that be agreeable to the
18 Government?

19 MR. CORCORAN: Yes.

20 In that event, I shall take them back to my
21 office and wait a request, or shall I leave them here?

22 THE CLERK: Myself and the Marshal will be here,
23 Judge, but I don't want that money --

24 THE COURT: Not the money.

25 Well, I hate to hold up the procedure, but I

1 suppose what you had better do is to hold on to the
2 money and the heroin and leave the other exhibits right
3 up here in two separate piles. Then if they call for
4 all of the exhibits we will get a call to you and you
5 will bring the money and heroin in. I will give them
6 instructions as to how the money and heroin shall be
7 handled.

8 MISS SELTZER: I presume if they want the
9 exhibits you won't need us here to give them the
10 exhibits.

11 THE COURT: Not if you agree.

12 MR. CORCORAN: I don't believe this report was
13 ever put in evidence, was it, it was just marked for
14 identification?

15 MISS SELTZER: No, it is not in evidence.

16 THE CLERK: Number six is not in evidence.

17 MR. CORCORAN: That won't be available to them,
18 but 1 to 11, everything else is.

19 THE COURT: OK.

20 (A hiatus in the trial then occurred because of
21 the Jury deliberation.)

22
23 (continued on next page)

24 EKarr
25 TlpmR4
follows

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(At 4:14 p.m. the following occurred in the absence of the jury.)

THE COURT: Would you want to mark this as an exhibit from the jury, mark it Exhibit No. 1, please.

THE CLERK: So marked.

THE COURT: I have a request from the jury, they want both sets of funds and a list of the serial numbers, the Miller and Jones report, the Manning and MacDonald report -- I didn't remember there was a Manning and MacDonald report.

MR. CORCORAN: What report are they talking about?

The reports are not in evidence.

THE COURT: The Manning-MacDonald report is not in evidence?

There was one report, is that just the Bernhart report?

MR. CORCORAN: The Bernhart report was marked for identification and not put in evidence.

MS. SELTZER: It was not put in evidence, perhaps you could advise them that they could have that portion of the testimony read back.

THE COURT: They have asked for the Bernhart testimony and the report read. They want the entire Bernhart testimony read and the Days, Annette Days'

1 2 testimony read.

2 I think what they have asked for -- well, we
3 will have to read it to them unless they can pinpoint
4 it.

5 I will go down each one of these requests with
6 them and I will tell them that we are going to send
7 all the exhibits and we will tell them the conditions
8 under which we will send the money and heroin.

9 MR. CORCORAN: They didn't want the heroin?

10 THE COURT: They didn't ask for it but it is
11 one of the exhibits. They asked for the money.

12 MS. SELTZER: You are not going to send the
13 heroin?

14 THE COURT: No, I won't send it in, I will say
15 it can be exhibited to them if they wish.

16 MR. CORCORAN: I don't have the Bernhart
17 report, it is not in evidence.

18 THE COURT: I understand that, I am going to
19 tell them it is not in evidence, but they have asked
20 for the testimony so we will have to reread all
21 Bernhart's testimony and Annette Days'.

22 Do you have Annette Days' testimony there which
23 was read this morning?

24 MR. CORCORAN: The woman (indicating reporter)
25 took it from me.

1 3 THE COURT: I have to find my copy, then.

2 MR. CORCORAN: Shall I go down and see if I
3 have it?

4 THE COURT: I think I have it here, it is a
5 question of finding it.

6 Bernhart's testimony I have here. I have
7 Bernhart's testimony here.

8 While we are going through that I will find
9 Annette Days' testimony which is a lot shorter, but
10 that is in this pile here someplace.

11 MR. CORCORAN: Would you like to get the copy
12 that was marked?

13 THE COURT: Yes, there were parts left out.

14 MR. CORCORAN: I believe so.

15 THE COURT: Yes, can we call the court reporter?

16 MR. KARR: Your Honor, I will see that it is
17 brought up immediately.

18 THE COURT: Very well.

19 Have the jury brought in.

20 (The jury entered the jury box.)

21 THE COURT: Ladies and gentlemen of the jury,
22 I have your note marked Court's Exhibit No. 1. I
23 will begin at the end.

24 "May we have 12 cups of coffee."

25 It had been my intention to let you all go home

1 4 about 5:30 or a quarter to six and resume deliberations
2 if you haven't reached a verdict by that hour tomorrow,
3 and I have discussed it with counsel. I am not a one
4 to keep jurors till all hours at night, till 11, 12
5 o'clock at night, unless they feel constrained or
6 they wish to do so.

7 Now, your request here may involve a consider-
8 able amount of time, depending on the length of the
9 reading, and if we send out for coffee it will just
10 about get here by 5:30, so I reluctantly am going to
11 deny that request.

12 Now, on the first two questions as to the
13 funds, the \$2,950 and the request for the \$850.

14 The procedure that we have worked out with
15 counsel for both parties here is that the Deputy
16 Marshal will take into the jury room, go in with you,
17 the two sets of bills and show each of you or exhibit
18 to you or hand them to you to the extent that you
19 wish to have them, but it is one of the rules that we
20 have to protect the money, and it is not that we think
21 that you will get out of that room with the money,
22 but nonetheless we have to follow this procedure,
23 and I'm sure you will all understand.

24 As far as the other exhibits are concerned,
25 those documents which have been marked in evidence I

1 5 will send them all in to you, to your Foreman at the
2 time you resume deliberations, so you will have all
3 the exhibits, that is, those that have been marked
4 in evidence, and that is, of course, all you can have
5 as far as exhibits are concerned.

6 Now, as far as the testimony is concerned, you
7 have asked for two testimonies, the Bernhart testimony
8 and the Annette Days testimony. If there is any
9 particular portion of the Bernhart testimony and/or
10 the Annette Days testimony, it may save time -- and
11 if you want it read we will read it all to you, as I
12 understand your question you want it all read, but
13 if you want to go out and then come back and tell us
14 which portions you wish read, I will be glad because
15 it may save some time.

16 THE FOREMAN: Yes.

17 THE COURT: Then you want to go out and decide
18 on the portions?

19 THE FOREMAN: Yes.

20 THE COURT: We will wait for you if you are
21 not too long.

22 Write me a note, Madam Foreman, of just what
23 portions you want.

24 (At this time the jury left the courtroom.)

25 (The jury continued its deliberations and then

1 6 a note was sent to the Court.)

2 THE COURT: All right, Ms. Seltzer.

3 They are asking for various portions.

4 First they ask for February 3, 1972. Bernhart's
5 testimony, the transaction of the heroin.

6 Then, February 10th, the time the Drummonds
7 arrived at 210 Cornelia Street, and they have marked
8 that as Detective Jones' testimony; arrived at 210
9 Cornelia Street through the time he was arrested.

10 Then I have got Inspector McDonald's or Trooper
11 McDonald's.

12 Then they have written testimony, and then they
13 have Annette's testimony as to how many entrances and
14 exits in the Days' house.

15 Then they have February 10, Bernhart's positive
16 identification of Drummond in the living room, then
17 Bernhart's testimony and the conversation the Days
18 had with Drummond.

19 Now I don't know whether we have got the Jones
20 and McDonald testimony transcribed, I believe we do.

21 MR. CORCORAN: That is the first day.

22 THE COURT: I know we have McDonald's, I don't
23 know if we have Jones'.

24 MR. CORCORAN: Jones' was the second day of the
25 trial.

1 THE COURT: Bernhart's testimony on the trans-
2 action of the heroin.

3 Do you have your copy?

4 MS. SELTZER: I don't have any of them, your
5 Honor.

6 (Continued on next page.)
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